



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/804,058	03/19/2004	Thava Vasanthan	PAT 970-2 US	8246
44955	7590	10/05/2007		
SQUIRE, SANDERS & DEMPSEY L.L.P. 1 MARITIME PLAZA, SUITE 300 SAN FRANCISCO, CA 94111			EXAMINER MELLER, MICHAEL V	
			ART UNIT	PAPER NUMBER
			1655	
			MAIL DATE	DELIVERY MODE
			10/05/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/804,058	Applicant(s) VASANTHAN ET AL.	
	Examiner Michael V. Meller	Art Unit 1655	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 10 July 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above claim(s) 3-13 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 14-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Art Unit: 1655

DETAILED ACTION

Election/Restrictions

Applicant's election of Group I, claims 1, 2, 14-17 in the reply filed on 11/22/2006 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

Thus, claims 3-13 are withdrawn from further consideration as being drawn to non-elected inventions.

The restriction is deemed to be proper and is therefore made FINAL.

Drawings

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the honeycomb structure of the beta-glucan must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate

prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Applicant argues that the drawings are fine but they are totally illegible and this patent applicant cannot ever be issued without such drawings changes since one cannot ascertain what is being claimed based on the poor drawing quality of these drawings. Claim 14 specifically claims a honeycomb structure based on the Figures and if one cannot even see what is in the figures then how can one figure out what is being claimed ?

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Art Unit: 1655

Claims 1, 2, 14-17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claims as now amended reads on a piece of barley flour which is clearly known for hundreds of years. How then are these claims claiming the invention in a definite way, because there is no way that applicant could be claiming natural barley flour that has been around for thousands of years. Further, it is unclear how applicant can state on the record that the honeycomb structure is the native structure and then claim that it essentially is intact, is it or is it not intact ? Applicant is claiming the native structure and then puts this limitation in the claim which is limiting and not limiting because it reads on the native oat structure but then claims essentially thus confusing the issue. How do you try to limit the structures and then say they are the native oat in the same claim it makes no sense on its face.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Art Unit: 1655

Claims 1, 2, 14-17 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Applicant argues that the figures clearly disclose what is being claimed but that is not the case. The examiner cannot determine what is being claimed. Applicant must provide drawings that provide a honeycomb structure that can be read. The drawings are illegible and thus cannot possibly provide evidence of possession of the native flour as now claimed.

Claims 15-17 are now even harder to understand since now applicant has inserted a formula in claim 15 which is confusing on its face. What is a lump ? What is the technical term ? It sounds like applicant made up this term. This formula now makes all the claims confusing and there is simply no way one can even determine if they had possession of the claimed invention since one cannot even understand the claims or the formula.

Further, it is not clear if applicant was in possession of the claimed honeycomb structure since in the claims applicant limits the structure and then unlimits the structure in the same claim making it read on native oat. Further, the drawings do not help show possession of the claimed invention.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 14-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Sander (see abstract, col. 3, lines 15-35, example 9, col. 10, lines 30-55, the claims) or Wikipedia about "Oats", see entire reference.

Sander clearly teaches a honeycomb structure derived from a starting material such as oat flour which inherently contains beta glucans since Sanders teaches that nutritive additives such as beta-glucans from oats were used. The oat inherently has the claimed shapes and structures since the claims read on the native oat as admitted by applicants in their response filed 7/10/2007 on page 6, third paragraph. The term structure and dispersibility are given their broadest reasonable interpretations. Thus, since dispersibility can be very relative. Further it is not clear what is meant by the formula in claim 15 or what the lumps are ? Dispersibility is also very relative and

Art Unit: 1655

subjective. The beta glucan in Sander would also have a high dispersibility since it is not even clear in the claim what the dispersibility is relative to compared to the other additives. Thus, given the broadest reasonable interpretation in the claims, the beta glucan in Sander does have a dispersibility of more than 99% since it has the honeycomb structure as claimed.

The structure of the honeycomb is inherent to Sander since the honeycomb is inherently in native oat and Sander teaches oat flour. Clearly derived from oat. Since Sander had the beta glucan (which is inherently in oat) then one must have had the native oat, thus having the claimed honey comb structure of the native oat as admitted by applicants as already noted.

Further Sander even admits in his specification in example 9 that the goal of this example was to evaluate different cereal shapes including honeycomb in order to establish single formula durability in manufacturing one or more shapes. Further it is noted that the claims even specifys that " a honey comb structure is defined as a concentrate of beta-glucan of essentially intact cell wall structures of the starting flour having significant void spaces within the cell wall structure". Thus, the claimed subject matter does not have to be restricted to oat with absolutely nothing done to it since "essentially" is used in the claim which makes the claim indefinite which makes it anticipated and undually broad.

Wikipedia makes it clear that oats have been known for hundreds of years. Since it is clear that oats have been known for hundreds of years and oat flour is merely rolled oats and then crushed then it is clear that the claimed subject matter and that of

Art Unit: 1655

wikipedia are one and the same. The claims read on the native oat thus meeting the limitations of the claims.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 14-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Takeuchi et al. (see abstract, col. 3, lines 20-40, the claims) in view of Sander (col. 3, lines 15-25, example 9 and the claims).

Takeuchi clearly teaches that the beta glucan is small amount of microbial glucans. The term concentrate and dispersibility are given their broadest reasonable interpretation. Thus, since concentrate can be very relative it would read on a small amount of a beta glucan. Dispersibility is also very relative and subjective. The beta glucan in Takeuchi would also have a high dispersibility since it is not even clear in the claim what the dispersibility is relative to compared to the other additives. Thus, given

Art Unit: 1655

the broadest reasonable interpretation in the claims, the beta glucan in Takeuchi does have a dispersibility of more than 99% since it has the honeycomb structure as claimed.

The structure of the honeycomb is inherent to the reference since the honeycomb is a beta glucan as claimed.

Takeuchi does not teach that the beta-glucan comes from oats or barley flour.

Sander teaches that oats, rice flour and others have beta glucans in them. Thus, it is simply the choice of the artisan in an effort to optimize the desired results to use beta glucans from oat flour since oat flour is well known to inherently contain beta glucan since it is derived from native oats as admitted by applicants.

The result-effective adjustment in conventional working parameters (e.g., determining an appropriate source of beta glucan) is deemed merely a matter of judicious selection and routine optimization which is well within the purview of the skilled artisan especially when the teachings of Sander are taken into consideration that oats are a common source of beta glucans.

Applicant argues that he is claiming the native structure but as noted above to have the beta glucan one must have had the native oat thus having the native honey comb structure as admitted by applicants already on the record.

The claims clearly read on native oat, thus clearly meeting the claimed invention.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

Art Unit: 1655

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

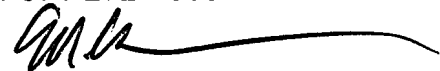
A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael V. Meller whose telephone number is 571-272-0967. The examiner can normally be reached on Monday thru Thursday: 9:30am-6:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1655

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Michael V. Meller
Primary Examiner
Art Unit 1655

MVM